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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. 429

IN THE MATTER OF
GRANADA HOTEL CORPORATION,
Debtor.

C. S. TUTTLE, ALBERT J. PETERSON, LEWIS W. RIDDLE, W. G. STURM, AND E. A. KILMER, AS MEMBERS OF A COMMITTEE CONSTITUTED UNDER THE TERMS OF THE DEPOSIT AGREEMENT DATED APRIL 28, 1933, ETC.,
Petitioners,

vs.

SAM HARRIS, J. ROSE AND I. GORDON, PETITIONING CREDITORS,
Respondents.

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY TO PETITION FOR CERTIORARI; AND BRIEF IN SUPPORT THEREOF.

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To the Honorable the Justices of the Supreme Court of the United States:

The reason relied on by the petitioners herein for the allowance of the Writ of Certiorari is the conflict of views in the interpretation of the term "equity receivership"

between the United States Circuit Court of Appeals for the Second Circuit in re 2169 Broadway Corporation, C. C. H. Par. 3546, July 15, 1935, and the United States Circuit Court of Appeals for the Seventh Circuit, in the case at bar. The court, in the former case, admitted that a mortgage foreclosure receiver may properly be called an equity receiver in the natural and obvious import of that term. It denied, however, that such a mortgage foreclosure receivership is an "equity receivership" within the meaning of Section 77B of the Bankruptcy Act. It asserted that Congress meant by "equity receivership" only the general receivership for liquidation which constitutes the fifth Act of bankruptcy under Section 3 of the bankruptcy law. Apart from the misconceptions of law upon which that decision is based, it would, if followed, have the most highly inconvenient consequences and might disastrously impair the jurisdiction of the Bankruptcy Court in cases of this character. For it would, in effect, make identical the conditions under which a creditors' petition will lie under Section 77B and the conditions under which an involuntary petition for adjudication in bankruptcy will lie against a corporation.

This insistence on the identity in the jurisdictional requirements of these two different kinds of remedy would seriously impair the highly remedial object of recent legislation for the relief of debtors. Where no other act of bankruptcy has been committed or where one has been committed more than four months before the filing of the petition it would be impossible, on this decision, for the creditors of an otherwise insolvent debtor to initiate proceedings under Section 77B even though all of the properties of the debtor were in mortgage foreclosure receivership. More specifically, it would deprive real estate bondholders whose liens are enforced by mortgage foreclosure proceed-

ings and through receiverships incidental thereto, of all possibility of relief by creditors' petition under Section 77B. These inconvenient results have been avoided by the decision of the Seventh Circuit Court of Appeals in the case at bar which recognized that a mortgage foreclosure receivership is an equity receivership and that as such, it provides the necessary jurisdictional facts for proceedings under Section 77B by creditors of real estate corporations against their insolvent debtors. Unless the decision in this case be followed, many thousands of petitions already filed by real estate creditors under Section 77B will necessarily be dismissed, many reorganizations of real estate corporations already consummated under Section 77B will be void and a condition of utter demoralization will be created in the real estate markets in the large metropolitan centers of this country. These and other legal grounds will be set forth in detail in the supporting brief.

Wherefore we respectfully submit that the petition for a Writ of Certiorari should not issue in this cause.

FRANK E. MCALLISTER,
MAURICE WALK,
Counsel for Respondents.

BRIEF.

STATEMENT OF THE CASE AND ISSUE.

A creditors' petition in this cause was filed against the Granada Hotel Corporation, debtor, in the District Court, alleging that a receiver had been appointed in the state court of the assets and property of the debtor. Upon the hearing it appeared that there was a foreclosure suit in the state court on a second mortgage upon the real estate and that a receiver had been appointed therein; that first mortgage proceedings had been started and were still pending through cross-bill filed in the second mortgage suit; and that, prior to the filing of the petition under 77B, the state court had ordered the receiver to place the first mortgage trustee in possession of the property. The trial court took the view that a foreclosure receivership was a "prior equity receivership pending" within the meaning of 77B, and that the discharge of the receiver and the placing of the trustee in possession, by orders of court, did not change the status. Upon appeal to the Circuit Court of Appeals, the judgment of the trial court was sustained.

The sole question raised by the petition for a writ of certiorari herein is whether a receivership of mortgaged property arising out of and in the course of foreclosure proceedings in equity, is an "equity receivership" within the meaning of Section 77B(a) of the Bankruptcy Act.

THE STATUTORY PROVISIONS.

The portions of 77B of the National Bankruptcy Act as amended that are material are as follows:

"(a) * * * Three or more creditors who have provable claims against any corporation which amount in the aggregate, in excess of the value of securities held by them, if any, to $1,000 or over may, if such corporation has not filed a petition or answer under this section file with the court in which such corporation might file a petition under this section, a petition stating that such corporation is insolvent or unable to meet its debts as they mature and, if a prior proceeding in bankruptcy or equity receivership is not pending, that it has committed an act of bankruptcy within four months, that such creditors propose that it shall effect a reorganization; and such corporation shall within ten days after the service of a copy of such petition upon it, answer such petition * * *.

(i) If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State or Territorial court, whether before or after June 7, 1934, at 12 o'clock noon a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section," * * *

ARGUMENT.

Section 77B(a) provides that three or more creditors having provable claims in excess of one thousand dollars ($1,000), may file a petition against a corporate debtor, stating that "such corporation is insolvent or unable to meet its debts as they mature, and if a prior proceeding in bankruptcy or equity receivership is not pending, that it has committed an Act of Bankruptcy within four months." The question to be here considered is whether a receivership of mortgaged property, arising out of foreclosure proceedings in the state court, is a "prior equity receivership" within the meaning of Section 77B.

Petitioner has contended that the term "equity receivership" must be limited to a general receivership for the liquidation of the corporation. "As we understand an equity receivership, it is one where the affairs of the corporation may be wound up." (p. 4, petitioner's brief.) His argument appears to be that only in such general receiverships for liquidation is there a receivership of the debtor corporation personally, that only in such general receiverships is the corporation itself in receivership, and therefore that they constitute a unique class of equity receiverships, different from all others in being an independent and final equitable remedy.

We shall argue that the term "equity receivership" taken literally has a plain and unequivocable meaning; that this meaning refers to the inclusive, generic class of receiverships arising out of proceedings in courts of equity; and that there is nothing either in the statute itself or on principle that justifies or requires a substitution for this gen-

eral class, of a particular species of receivership comprising the general corporate receiverships for liquidation. We shall point out that the petitioner's case is based upon mistaken notions concerning the basic character of the equity receivership. We shall argue that 77B itself provides in sub. (i) its own definition of equity receivership for the purpose of filing a petition thereunder. And that this definition includes a receivership arising out of and in the course of mortgage foreclosure proceedings as in the case at bar. Not only, therefore, is there an equity receivership here on general principles of equity jurisprudence and statutory construction, but also on the explicit terms of the statute itself. Although some phases of the analysis of the general principles applicable to equity receivership have only an academic interest in view of the explicit provisions of sub. (i), a discussion of them has nevertheless been undertaken in order to clarify matters upon which the petitioner is under some fundamental misconceptions.

We shall pay particular attention to two main arguments in petitioner's brief. The first is that, since the only receivership which constitutes an act of bankruptcy is the appointment of a general receiver for liquidation, "equity receivership" under 77B should be interpreted by parity of reasoning as a general liquidating receiver. We shall deal with this argument under Point 5. We shall point out that Section 77B expressly makes any pending equity receivership a ground of jurisdiction *in the alternative* to the general equity receivership for liquidation which is one of the acts of bankruptcy under Section 3. Being an alternative ground of jurisdiction under 77B the meaning of the term "equity receivership" must necessarily be interpreted as having a different and wider extension than the term "general receivership for liquidation."

The second main argument in petitioner's brief (p. 3)

is an attempted *reductio ad absurdum.* Suppose, it is said, a corporate debtor owns a dozen hotels, only one of which is encumbered. The corporation might be perfectly solvent and able to pay its debts, and yet there might be a foreclosure proceeding and a receivership of the encumbered parcel. Will the creditors, we are asked triumphantly, be permitted to bring such a corporation into a bankruptcy court for reorganization under 77B? By no means. There is an equity receivership here of course, an equity receivership of part of the corporate property, though not an equity receivership of the corporation itself which, as we shall show under Point 4, sub. D, is a strictly meaningless conception. *But though there is an equity receivership in the supposed case, a petition under 77B could not lie because there can be no allegation of insolvency, or inability to pay debts as they mature, which is one of the prime jurisdictional allegations under 77 B* (a). Moreover in the instant case it is not denied and the record discloses that all of the assets of the corporation were in the custody of the receiver and thereafter in the custody of the trustee under the mortgage pursuant to order of Court in the foreclosure proceedings and that the corporate debtor was insolvent and unable to pay its debts. The hypothetical question of the petitioner is thus easily answered although the facts supposed are entirely irrelevant to the issues here presented. We shall deal more fully with this matter under Point 7, sub. A, and show that "equity receivership" when taken, as we contend it should be, in its literal and broad significance, involves no absurd or harsh consequences at all but that, on the contrary, it is the interpretation contended for by petitioner which would destroy any possibility of relief under Section 77B to large classes of real estate creditors and so lead to intolerable and unjust results.

I.

THE TERM "EQUITY RECEIVERSHIP" TAKEN LITERALLY HAS A NATURAL AND OBVIOUS IMPORT. IT REFERS TO THE GENERIC CLASS OF ALL RECEIVERSHIPS ARISING OUT OF AND IN THE COURSE OF EQUITY PROCEEDINGS AND CANNOT BE LIMITED TO ANY PARTICULAR SPECIES THEREOF.

A. *"Equity receivership" connotes the idea of custody and administration of a res by a court of equity through its duly constituted agents.*

The meaning of a general term has two aspects, its connotation and its denotation. Its connotation is the group of ideas that it signifies. Its denotation is a class of particular objects referred to. Looking at the term "equity receivership" from this approach it connotes the following ideas:

1. The proceeding in which the receiver is appointed must be an equity proceeding as distinguished from other than equity proceedings. That is, there must be some equitable right or some form of equitable relief being adjudicated in a court of chancery.

2. The receiver must be the representative of a court of chancery.

3. The property or fund must actually be in the custody of and in the course of administration by the duly constituted representative of the court. It is not enough that a receiver has been appointed. If he has not yet actually taken custody and started upon the functions of his office, there is an equity receiver, but not an equity receivership. The term "receivership" refers to the status or condition of the property or fund being administered by the receiver. It is thus possible for the property to be in the same receivership although there are successive receivers.

Transfer from one receiver to another occurred in the case at bar. The second receiver was the trustee under the first mortgage. It thus functioned in two capacities—(1) As trustee under the trust deed in which capacity its rights and powers were no greater and no different after the transfer than before; and (2) As arm or representative of the court in which capacity its powers were derived from the general equitable jurisdiction and judicial power of the court itself.

The order of the equity court in the foreclosure proceedings transferring custody to the trustee under the first mortgage did not therefore alter the status of the property as being in *custodia legis*. The property remained afterwards as before, in the custody of the court through its representative who happened to be also the trustee under one of the mortgages. As such a representative, the trustee took custody of the property not on its own motion or under its powers as trustee but under an order of the court, and it functioned thereafter not by authority derived from the private agreement of the parties as incorporated in the trust indenture but as an arm or hand of the court. Like any other receiver it was part of a judicial instrumentality and process for adjudicating the equitable rights of the parties before the court. Like other receivers it administered the property under the control and direction of the court, rendered its accounts, obtained leave to make expenditures, entered into leases and was subject in every other way to the same supervision in the details of its administration as other receivers. It retained custody at the pleasure and discretion of the court and could be divested of custody by the court's summary order. All the determining characteristics of the receivership are here present. There was custody of the property in the court through a judicial instrument and the administration of the property under

the supervision of the court pending the adjudication of the controversy. The mere fact that the court's representative was also functioning in some other capacity and has been referred to in these proceedings as the trustee rather than as the receiver, is of no material significance as the court below said in *re Granada Hotel Corporation,* 9 Fed. Supp. 909:

> "As is frequently observed, a receiver is a fiduciary of the court, appointed as an incident to other proceedings where certain ultimate relief is prayed. The trustee here, likewise, is a fiduciary of the state court and is acting under the orders, directions and control of that court. Words of themselves are unimportant. Whether the trustee be called a receiver, a guardian, a custodian, or by some other name, it remains, in its essence, a fiduciary in possession of property pending the outcome of foreclosure, holding under the court's order, incidentally to the ultimate purpose of the state proceedings. Consequently there is an equity receivership within the meaning of that term by Congress."

B. *The denotation of the term "Equity Receivership" is the class of all specific kinds of receiverships that can be created in a court of equity.*

It is elementary that general terms must be given a general construction. A general term will be given a restricted meaning only under exceptional circumstances, as when the general meaning would lead to injustice, oppression and absurd consequences or results so extraordinary or unjust that they cannot be deemed to have been within the legislative intent.

> "If the statute did not expressly name any kind of insurance, but used general words, then it would cover all kinds of insurance contracts, as the rule is well established that where a statute contains general words only such general words are to receive a general construction, and the effect of them is not to be limited

except by express words of the statute itself." *Mears Mining Co.* v. *Md. Casualty Co.*, 144 S. W. 887.

"Unless some ground can be found in the statute for restraining or enlarging the meaning of its general words, they must receive a general construction, and the courts cannot arbitrarily subtract from or add thereto." *Tynan* v. *Walker*, 35 Cal. 634, 642.

"Since it is the duty of the courts to ascertain the meaning of the legislature from the language of the statute, general words are to have a general operation unless the manifest intention of the legislature affords grounds for qualifying or restraining them." 25 R. C. L. 970-1.

Where the general term has also a special and particular significance the general meaning must be preferred unless it leads to injustice, oppression or absurd consequences.

"The language of the statute should be taken in its general, instead of its particular, meaning unless a contrary intent clearly appears therefrom." *Abbott* v. *City of Milwaukee*, 134 N. W. 137.

Nothing in the provision under discussion here or in the act itself limits the generality of the term "equity receiverships." There is no reference in the statute to a "general corporate receivership," nor to a "receivership *of the corporation* itself." The argument of the petitioner is based largely upon the surreptitious assumption that the statute uses one of these expressions. But no such language is used in the statute from which it might be inferred that "equity receivership" must be limited to general receiverships for the liquidation and distribution of corporate assets, or to any other one species of receivership in equity. The only limiting requirement is that the receivership must arise out of proceedings in equity. No further qualification or limitation as to the kind of receivership or in respect of its purpose is expressed or implied. Nor is there any express or implied exclusion of any particular kind of receivership in equity,

such as a receivership arising out of mortgage foreclosure proceedings. The term comprises any and all situations which satisfy the conditions of being a receivership in equity. It refers to *all* receiverships in equity without discriminating between them.

The term "equity receivership" in the statute is a reference to a *kind* of legal arrangement or device through which property may be administered by a court of equity and not to any specific purpose for which such administration takes place. There are an indefinite number of such purposes corresponding, as we shall see, to the primary rights and remedies which are the subject matter of equity jurisdiction and in which the receivership device is used, and therefore an indefinite number of kinds of equity receiverships. When the statute speaks of "equity receivership," it is therefore speaking of a basic kind of legal arrangement, and not of one specific receivership in equity or one restricted class of equity receiverships. It refers to all receiverships in equity and to all legal situations in which that device is used.

A receivership arising out of equity proceedings to foreclose a mortgage is thus an "equity receivership" in this natural and obvious import of the term. It is thus one of the class denoted by the term "equity receivership." Another would be general liquidating receivership.

That this is the plain and natural import of the term is admitted in the leading case depended upon by the petitioners *in re 2168 Broadway Corporation.* C. C. H., Par. 3546, where the court said:

> "It cannot be gainsaid that an action to foreclose a mortgage is a suit in equity and that the receiver appointed in such a suit to conserve the mortgaged property and collect the rents pending foreclosure may properly be called a receiver in equity.

II.

SINCE "EQUITY RECEIVERSHIP" TAKEN LITERALLY HAS A DEFINITE AND PRECISE MEANING, THERE IS NO AMBIGUITY AND NO OCCASION OR ROOM FOR INTERPRETATION.

A. *An ambiguity arises when a provision, taken literally, has no definite and precise meaning, or leads to absurd results.*

It is fundamental that courts will not resort to interpretation when the provision is not ambiguous. An ambiguity does not arise simply because it is possible by an elaborate and artificial process of reasoning and conjecture to suggest the bare possibility of a second meaning. Nor is it created by the existence of a colloquial meaning which diverges from the primary, legal meaning. The ambiguity must arise from the presence of two literal and equally valid interpretations of the term. In the case at bar we have shown the term "equity receivership" to have a definite and natural import. It is not rendered ambiguous by the suggestion that in another context and with the addition of other words such as "corporate" and "general" it might have a more restricted meaning. There is, therefore, no occasion and no propriety for embarking upon a process of judicial interpretation which in instances of this kind become an enterprise "in conjectures *aliunde*."

> "There must be an ambiguity in the language itself and not the mere possibility of a doubt or a conjecture about what it might mean, if it did not literally mean what it says."
>
> "*The possibility of a doubt is not sufficient.* It is out of such possibilities that controversies arise, and it is the duty of courts to ascertain by judicial interpretation, not whether a doubt may be asserted but whether any ambiguity really exists.
>
> When the words used have a definite and precise

meaning, it is not allowable to go beyond the statute in order to restrict or extend their meaning.

It is not allowable to interpret what has no need of interpretation, or *when the words have a definite and precise meaning to go elsewhere in search of conjecture in order* to restrict or extend the meaning.

Statutes and contracts should be read and understood according to the most natural and obvious import of their language without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation."

Chicago Home for Girls v. *Carr*, 300 Ill. 478, 483. (Italics ours.)

"Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction.

Where the language of an enactment is clear and construction according to its terms does not lead to absurd or impractical consequences, the words employed are to be taken as the final meaning intended."

U. S. v. *Mo. Pac. R. R.*, 78 U. S. 269, 73 L. Ed. 322.

In the above cited cases the court could have avoided inconvenience and hardship by disregarding the primary and natural meaning of the words in favor of a strained and secondary meaning which was being urged upon it. This it refused to do. In our case no inconvenience or embarrassment results from accepting the provision in its plain, natural meaning, as referring to the general and inclusive class of all receiverships in equity. It is the limited and special meaning assumed by the petitioner which, as we shall show below, would be attended by serious, if not disastrous, consequences. When there is no inconvenience and hardship resulting from a plain rendering of the words, there is a *fortiori*, no excuse whatsoever for resorting to

construction for the very purpose of giving a forced, limited and exclusive meaning which will defeat the beneficent purposes of the act.

B. *An ambiguity occurs here only if it is deliberately created by rewriting the provision and adding words to the statute.*

Petitioner contends that "equity receivership" means general corporate receivership for liquidation or for some other purpose and excludes all other receiverships in equity. But this is possible only if we add the words "general" and "corporate", and also add words of exclusion directed against all other equity receiverships except general corporate receiverships. This procedure, of course, would violate all sound doctrine. It would deliberately create ambiguities where none existed before by undertaking to rewrite the statute. When a statute has a plain and natural meaning, courts cannot rewrite it even to avoid harsh consequences. When existing provisions taken literally lead to beneficial results, and when the proposed change itself would have disastrous consequences, any conceivable reason for laying violent hands upon the wording of the statute disappears.

To substitute "general receivership" for "equity receivership" would not only rewrite the provision, but would create further ambiguities and repugnancies with other sections of the statute, notably sub. (i) which, as we shall see, defines "equity receivership" for the purpose of filing a petition under 77B as meaning a receivership of *all or any* part of the corporate assets. Sub. (i) renders conclusive our above argument on general principles of interpretation, viz.: that the act does not refer to one special kind of receivership, but to any receivership where all or

any part of the debtor's property is in the custody and administration of a receiver or of a trustee in custody of the property under direction of a court of equity of an equity court without regard to the purpose of the receivership. We shall return to this in greater detail in our discussion of sub. (i) below.

C. *An ambiguity is created when a different and colloquial expression is substituted for the phrase "Equity Receivership".*

There is a colloquial expression which speaks of a "receiver of a corporation" or of a "corporation being in receivership," and this colloquialism refers to a general receiver for conservation of all the assets of a corporation, pending its reorganization or liquidation. It must be pointed out, however, that the statute nowhere uses such expressions. It does not speak anywhere of a receivership *of a corporation,* or of a corporation itself being in receivership, and we shall show moreover in due course that such expressions are strictly meaningless in the law. The statute speaks only of "equity receiverships," which, taken literally, is the inclusive designation of all receiverships in equity and is defined in sub. (i) of Section 77B as a receivership of all or any part of the debtor corporation's property. Petitioner, however, continually interpolates and insinuates this colloquialism whenever there is a reference to "equity receivership" and thus creates the impression that the statute actually speaks of a "receiver of the corporation." Thus (page 4 of his brief) when he puts an example of a perfectly solvent corporation only one of whose properties is in foreclosure receivership, he says: "Certainly, it could not be said, under such circumstances, that the corporation was in equity receivership." The question is not whether the corporation itself is in "equity receiver-

ship;" because no such requirement is stated in the statute and could, strictly speaking as we shall see, have no meaning if it were. No one contends that in the supposed case the corporation itself is in "equity receivership." Our contention is that in the supposed case there is an "equity receivership" as defined by the statute, even though, for lack of essential jurisdiction facts a petition under Section 77 (b) would not lie. We simply wish to observe at this point that petitioner, by means of such a colloquial expression begs the question by improperly substituting a colloquialism which has an entirely different meaning for the phrase actually used in the statute.

That a use of a colloquialism may lead even a court into error is shown in the case of *re* 2168 *Broadway Corporation,* C. C. H. 3546, upon which petitioner relies. Instead of consulting the literal meaning of "equity receivership," the court assumes that the statute refers to the colloquialism which speaks of the corporation itself being in receivership. Because the statute is about debtor corporations, the court simply assumes that "equity receivership" must have been intended to refer to a receivership of the corporation itself. Because of this mistaken assumption the court rejects the legal and literal meaning which it had set forth, in favor of a meaning used in "common parlance." It concludes that "equity receivership" must be confined to the so-called "conservation suits" which are brought "for the reorganization of the debtor or the pro rata distribution of its assets among its creditors," and in which the corporation, by answer, confesses the allegations of the bill and consents to the appointment of a receiver. Not only is this substitution of a colloquialism for the plain words of the statute indefensible from the point of view of the art of statutory interpretation, but the result arrived at by the court would

seriously impair jurisdiction to entertain petitions under 77B on the ground of pending "equity receivership." This follows from the decision by the United States Supreme Court in the case of *Shapiro* v. *Wilgus,* 287 U. S. 344, 77 L. Ed. 355, in which consent receiverships in such "conservation" suits have been condemned in strong language as collusive devices. It is questionable whether such suits can continue to be used hereafter. Surely, it is inexpedient in the highest degree to limit "equity receiverships" to such irregular and eccentric proceedings whose practical usefulness is seriously limited, if not completely destroyed by recent decisions. The court, in *re* 2168 *Broadway Corporation,* was obviously misled by the same uncritical assumption that we noted in the petitioner's argument. It mistakenly supposed, because Section 77B is a statute about corporations, that a reference to "equity receivership" was a reference to the colloquialism where the corporation itself is said to be "in receivership."

We shall deal fully with this colloquial expression under Point 4 sub. D and show that, strictly speaking, it is entirely devoid of any legal meaning whatsoever, because there is no such legal conception as a receivership of the corporation itself. At this point we desire only to point out the impropriety of ignoring an expression which has a literal and definite significance and substituting therefor a colloquialism, the effect of which is to *create* an ambiguity where none existed before and which will seriously, if not disastrously, restrict the court's jurisdiction in cases of this character.

POINT III.

ACCEPTANCE OF THE BROAD MEANING OF "EQUITY RECEIVERSHIP" AS INCLUDING MORTGAGE FORECLOSURE RECEIVERSHIP IS IN ACCORDANCE WITH THE RATIONAL WEIGHT OF AUTHORITY. THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS IS BASED UPON NUMEROUS MISCONCEPTIONS AND SHOULD NOT BE FOLLOWED.

In its opinion in this case, affirming decision of Lindley, J., this court said as follows:

> "Concededly there is but one question in this case, and that is whether or not at the time of the filing of the petition under Section 77B of the Bankruptcy Act there was a prior proceeding in equity receivership pending. The record shows, that prior to the filing of this petition, a bill to foreclose had been filed in the State Court by a second mortgage under which a receiver had been appointed. While that case was pending, the trustee named in the first mortgage appeared in the State Court, and asked that Court to enter an order directing its receiver to report to the trustee, and turn over to it the possession of the mortgaged property. The State Court entered the order, but the foreclosure case was still pending before the Master at the time of the filing of the petition herein, and jurisdiction over the property and the trustee remained with that Court. This showing was sufficient to sustain the jurisdiction of the Bankruptcy Court under Section 77B, Clark on Receivers, Secs. 12, 13, 14, and 963, and the District Court so held.
>
> The order of the District Court sustaining the petition is therefore affirmed."

After the decision of the 2nd Circuit Court of Appeals in *Re* 2168 *Broadway Corporation,* C. C. H. 3546, a petition for a rehearing was filed in the above case and was denied.

In *Matter of Surf Building Corporation,* (D. C., E. D. Ill. October, 1934, not officially reported) C. C. H. Bank-

ruptcy Law Service, Paragraph 3076, the court had refused to dismiss the petition of bondholders whose bonds were secured by a mortgage then in foreclosure, a state court receiver in the foreclosure suit having been in possession of the property for three years. The court said in part:

> "It may be well to comment upon one or two contentions submitted by the respondent. It is insisted that an equity receivership, growing out of a foreclosure proceeding which vests in the receiver of a court of equity the custody and possession of all the assets of the corporation, is not an equity receivership within the meaning of the statute. I have already said in other cases, probably so often as justly to be accused of tiresome reiteration, that a receivership in equity is always incidental to some other ultimate purpose: that equity jurisprudence recognizes no such proceedings as one which has for its only prayer for relief, receivership, but that all receivers in equity are appointed, whether in dissolution of partnerships, in mortgage foreclosure or upon creditors' petition, in subordination of and incidental to the main purpose of the litigation. This court is of the opinion that Congress did not intend, by the provisions of 77-B, to limit jurisdiction under that section to equity receiverships other than those in foreclosure cases. To do so would be to defeat the purpose of the Act in a very important branch of equity jurisdiction."

In C. C. H. Bankruptcy Law Service, Paragraph 3007, the reporter states that there was a similar holding by Judge Lindley in the case of *In re Flamingo Hotel Company*, decided August 9, 1934, which is not officially reported.

Certain remarks of the court in the case of *In re Laclede Gas Light Co.*, (U. S. D. C., E. D. Mo., June 26, 1934), C. C. H. Bankruptcy Law Service, Paragraph 3001, tend to the contrary of the three decisions cited above. The question, however, was not involved in the actual decision in that case, which was rendered less than three weeks after the approval of Section 77B. In that case a suit had been filed

to foreclose a mortgage, in which a receiver was prayed to take charge of the properties of the alleged debtor. But the receiver prayed for had not actually been appointed. While the court did say that a foreclosure receivership "is not strictly speaking an equity receivership," it was sufficient to the decision in that case that no equity receivership was pending since no receiver had actually been appointed. The court made it plain that this was the basis of its decision, saying (p. 1102):

> "If Congress had meant that the mere filing of an action wherein a receiver, as a mere incident, should be asked for, it would have said 'a proceeding for the appointment of a receiver.' It did not say this. There is not any doubt. I repeat, that, if Congress had meant a mere incidental request for the appointment of a receiver, it would have said so in plain and explicit words.
>
> Now, what would be the disturbing effect of such a construction as is here contended for by petitioner? It would leave open the road to file a proceeding like this at bar in every case where a corporation, though eminently solvent, was yet presently embarrassed for lack of cash. This, by merely filing a petition for a receiver, without any well-founded hope of having one appointed, and then by following up such petition by a petition as at bar. Congress could not have intended to leave open such a wide road to collusion and financial chaos and disaster if it had stopped to consider the dire legal consequences of its action, and it must be presumed that Congress did give these consequences full consideration."

The Laclede case simply holds that where all that happened was the filing of a suit requesting the appointment of a receiver, no receivership was "pending". It is a holding on the meaning of the term "pending" and not on the meaning of the term "equity receivership." This view of the Laclede case is confirmed by the Circuit Court of Appeals in *Re Broadway-Barclay Corporation*, C. C. H., Par. 3547, where the Laclede case was referred to as a suit

for the appointment of a receiver which had been commenced but where a receiver had not yet actually been appointed.

The case of *Brjan* v. *Welch*, 74 Fed. (2d) 964, is another authority cited by petitioner. There a receiver was appointed for all the corporate assets upon allegations of mismanagement and fraud by the corporate officers. The receivership was to continue until a suitable management had been established. It was held that this constituted an equity receivership and since the corporation was insolvent or unable to pay its debts, that a petition under 77B would lie. We have no quarrel whatsoever with this holding which is in exact accordance with our own views, but petitioner interprets this case as deciding that no other receivership but a general receivership for all the corporate assets is the proper interpretation of the term "equity receivership." The case itself gives no warrant for this restriction. It simply holds that a general equity receivership for temporarily operating the corporate business is an equity receivership. Therefore, says the petitioner, it holds that no other kind of receivership in equity is an "equity receivership." This is a rather elementary logical fallacy. It is like saying because "all Chicagoans are inhabitants of the United States" that "all inhabitants of the United States are Chicagoans" or that "no one is an inhabitant of the United States who is not a Chicagoan." Similarly from the holding that a general corporate receivership is an equity receivership, it does not follow that every equity receivership must be a general corporate receivership.

In re 2168 Broadway Corporation, C. C. H. 3546, has been cited by petitioner. In that case the petitioning creditors were holders of a second mortgage, while the first mortgage was in the hands of an individual who opposed

the proceedings for reorganization under 77B. Under such circumstances, a reorganization under 77B was hopeless from the outset. The petition, therefore, could have been disposed of under accepted principles as lacking in good faith. The court, however, rested its judgment on the issue of "equity receivership," denying that a mortgage foreclosure receivership was an "equity receivership" and contending that "equity receivership" under 77B means only general receiverships for liquidation or reorganization of corporations. We have already pointed out that the court erred in choosing a narrow and colloquial meaning for which there is no warrant in the statute itself, and ignoring the literal meaning of the words being interpreted.

The more important error committed by the court is its view that a mortgage foreclosure receivership cannot be an equity receivership because it is not an Act of Bankruptcy, only general liquidating receiverships being such. We shall argue this question in greater detail under Point V and shall show that the terms "equity receivership" and "Act of Bankruptcy" are plainly and expressly in a disjunctive relation and must be given effect as separate and distinct grounds of jurisdiction unless the term "equity receivership" is to be regarded as an entirely superfluous expression in the statute.

Moreover the court expressly approves of *Bryan* v. *Welsh*, 74 Fed. (2d) 964. But that case must be placed in definite opposition to the views of the court in *In re 2168 Broadway Corporation*, and to the language in *In re Laclede Gas*, C. C. H., par. 3001, and to *In re Draco Realty Corp.*, C. C. H., par. 3492, that only a general receivership for liquidation such as would constitute an Act of Bankruptcy is an "equity receivership" under 77B. In *Bryan* v. *Welch*, the receivership was not for the purpose of winding up the affairs of the corporation, but for temporarily

operating the business, and it was expressly directed by the court when the receiver was appointed, that the assets be turned over to the new corporate management when a suitable one would be established. *Although not for liquidation and not an Act of Bankruptcy, it was nevertheless held to be "a prior equity receivership" within the meaning of Section 77B.*

If *In re 2168 Broadway Corporation,* C. C. H. 3546, be followed, jurisdiction under Section 77B would be limited to situations where an Act of Bankruptcy had been committed. Surely it could not have been the intent of Congress to limit jurisdiction for the relief of debtors to the ordinary bankruptcy situations. The whole rationale of the recent legislation for the relief of debtors is to extend relief to situations hitherto not cognizable by bankruptcy courts. These recent acts are not statutes of liquidation but statutes of reorganization and the procedures provided therein should not be narrowly confined to situations where an Act of Bankruptcy has been committed. If they are so limited and if the authority of the Circuit Court of Appeals in the case at bar is rejected in favor of *In re 2168 Broadway Corporation,* C. C. H., Par. 3546, then the curative processes of Section 77B will be most seriously impaired. Debtor and creditor would have to wait until the debtor has been reduced to committing an Act of Bankruptcy before they are eligible for relief.

IV.

THE CONTENTION THAT "EQUITY RECEIVERSHIP" MEANS "GENERAL CORPORATE RECEIVERSHIP" RESTS ON THE MISCONCEPTION THAT A GENERAL CORPORATE RECEIVERSHIP IS AN INDEPENDENT FORM OF EQUITY JURISDICTION, AND ON THE MISTAKEN NOTION THAT IT IS A RECEIVERSHIP OF THE CORPORATE PERSON.

Petitioner's contention that "equity receivership" must be restricted to "general receivership for the assets of the corporation" is based upon the belief that such a general receivership is a unique and exceptional form of receivership in equity. This belief is based upon two grounds, one of which is expressly advanced and the other implied. The one expressly formulated is that only the general corporate receivership is the receivership of a corporation *personally*, whereas the other receiverships in equity attach only to the property or fund. The one implied is that the general corporate receivership is an independent and ultimate form of equitable remedy. It is asserted by implication that there is a form of equitable relief and jurisdiction described as the appointment of a general receiver for the corporation, where the sole prayer for relief is the appointment of a general receiver. Even if these two arguments were valid and the general receivership were proved to be a peculiar and exceptional form of receivership it would not follow by any means, for reasons previously mentioned, that the inclusive and generic term "equity receivership" as used in the statute could be confined to that special and exceptional form of it. It would not follow, because a given legal arrangement has a unique form, that Congress intended the plain meaning to give way to the unique and special meaning. We shall show, however, that these arguments are

invalid and are based upon elementary misapprehensions of the legal concepts involved. There is nothing unique about general corporate receiverships. We shall show that all receiverships, including general corporate receiverships, differ among themselves depending on the ultimate form of equitable relief to which they are subsidiary, but that they all agree in that they are always incidental to and in aid of such an ultimate remedy, and are never in themselves the final object of a proceeding in equity. The general corporate receiverships are no exception to this. Like all other equity receiverships they are always incidental to some more final statutory or equitable remedy. They differ from other receiverships and among themselves in having different remedial purposes and in being clothed with different powers appropriate to these purposes.

A. *Equity receiverships without exception are incidental to and in subordination of some primary right or remedy which is the subject matter of equitable jurisdiction.*

It is well established that the receivership in equity is always *pendente lite* for the purpose of preserving the status quo for the benefit of all parties, while their respective rights are being adjudicated or for the purpose of carrying out the decrees of the court thereafter. It is always thus an instrument in a larger purpose and never an end in itself. There are an indefinite variety of such purposes—to wind up the affairs and liquidate the assets of a corporation, to take possession of the assets and temporarily to conduct the business because of mismanagement, fraud, incompetence, illegality, etc., pending the adjustment of conflicting rights and equities; to take possession of and manage property against which a lien is sought to be established and enforced. These are only some of the manifold purposes for which receivership may be used. The

only way to describe an equity receivership is by reference to and in terms of the rights being adjudicated and the primary remedy which is the object of the litigation. It is impossible, therefore, to speak of "an equity receivership" standing by itself and without reference to the remedy to which it is auxiliary. To speak as the petitioner does of *an* equity receivership without further characterizing it in terms of more ultimate forms of relief is therefore strictly meaningless. The term "receivership" necessarily imports relation to some more ultimate remedial purpose.

In *Gordon* v. *Washington* (April 1, 1935), U. S., 79 L. Ed. 626, the court said, per Stone, J. (p. 630):

> "A receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. It is not an end in itself. Where a final decree involving the disposition of property is appropriate asked, the court in its discretion may appoint a receiver to preserve and protect the property pending its final disposition."

In re Surf Bldg. Corp., U. S. Dist. Ct., E. D. Ill., Oct. 17, 1934, C. C. H. 1171:

> "It is insisted that an equity receivership, growing out of a foreclosure proceeding which vests in the receiver of a court of equity the custody and possession of all the assets of the corporation, is not an equity receivership within the meaning of the statute. I have already said in other cases, probably so often as justly to be accused of tiresome reiteration, that a receivership in equity is always incidental to some other ultimate purpose; that equity jurisprudence recognizes no such proceedings as one which has for its only prayer for relief, receivership, but that all receivers in equity are appointed, whether in dissolution of partnerships, in mortgage foreclosure or upon creditors' petition, in subordination of and incidental to the main purpose of the litigation. This court is of the opinion that Congress did not intend, by the provisions of 77B, to limit

jurisdiction under that section of equity receiverships other than those in foreclosure cases. To do so would be to defeat the purpose of the Act in a very important branch of equity jurisdiction."

U. S. v. *Sloan Shipyards Corp.*, 270 F. 613:

Creditors came into court and asked for the seizure of debtor corporation's property by the court through its receiver and for nothing else.

"The receivership applied for in this case is the main object of the suit, and is not ancillary to relief prayed for in the complaint.

Undoubtedly in the Federal Court, to justify the appointment of a receiver, some final relief in equity must be prayed which will justify the court in proceeding. A receivership cannot be considered final relief. It is merely an agency by which the court may reach out and administer assets having relation to the general relief."

Central West Public Service Co. v. *Craig*, 70 Fed. Md. 427, 432:

"The appointment of a receiver is an ancillary, an incidental remedy only, and is not final relief nor is it properly the end or object of the litigation, but is a remedy allowable only in connection with a suit pending for some other purpose in which there is a prayer for ultimate relief which the court has jurisdiction to grant, and to which the appointment of the reeciver is an aid."

Zuber v. *Micmac Mining Co.*, 180 Fed. 625, 627:

"Even though the parties have already agreed upon a receiver, the court is not relieved from looking at the question of jurisdiction, and from inquiring whether the application for receivership is really with the view of obtaining final relief, or merely for the purpose of securing a receivership, for the mere sake of a receivership. In the case at bar there is no final relief asked for in the bill. A receivership can not be held by this court to be final relief; and it cannot be made final by the suggestion that the receiver may

bring suits, and in that way obtain some ultimate relief. The purpose of a receivership in equity is to be ancillary to, and in aid of, the primary object of the litigation. It cannot be the primary object of the litigation."

B. *No particular form of equity receivership is uniquely entitled to that designation to the exclusion of other receiverships in equity.*

Petitioner's contention that the term "equity receivership" must be reserved for a receiver to liquidate the corporate assets or for any other type of general corporate receiver is therefore without any justification. There is no such thing as *the* equity receivership. There are only equity receiverships in the plural. These can be identified only by reference to their primary remedial object. The liquidation of a corporation or the custody of its assets pending the establishment of a new management are simply particular kinds of remedy in which the receivership functions. Neither the receivership for the purpose of liquidating corporate affairs nor any other type of general receivership for the corporate assets nor any other particular kind of equity receivership is entitled to be regarded as *the* equity receivership *par excellence*, nor is any one kind of general receivership for corporate assets entitled to be regarded as *the* corporate receivership. The receiver appointed to operate the corporate business temporarily because of mismanagement etc., is as much a corporate receiver as a receiver appointed to liquidate the corporate assets. There is no more reason for regarding the liquidating receivership as *the* corporate receivership, than there is for regarding it as *the* equity receivership.

C. *"The general receivership for the assets of a corporation" is not a final or in itself ultimate form of relief but is always instrumental to a specific and more ultimate remedial purpose.*

Just as there is no proceeding for an "equity receivership" without reference to a more ultimate remedial objective, just so is there no general receivership for the assets of a corporation, existing in and for itself. There is no such legal action as a proceeding for a general receivership for the assets of a corporation without a further determination in terms of an equitable or statutory remedy which the receivership is to subserve. Thus there are general receiverships for the liquidation of the assets of a corporation upon its dissolution or insolvency. There are general receiverships for temporarily running the corporate business because of mismanagement of the officers or because of their fraud, illegality, etc. There are as many general receiverships as there are legal purposes for which all of a debtor's property can be placed in *custodia legis*. These general corporate receiverships differ widely among themselves not only in respect of their final remedy but also in respect of the powers with which they are furnished. Thus the receivership for liquidation has ordinarily no power to conduct the business, but has the power to sell the assets. The receivership for conservation ordinarily has power to conduct the business but no power to sell the assets. There is no action for the appointment of a general corporate receiver simpliciter. There is no such legal conception therefore, as *the* "general receivership for the assets of a corporation" by itself and without more, nor is there any equitable remedy where the sole prayer for relief is the appointment of a general receiver for the corporate assets. "General corporate receivership" like the more general term "equity receiver-

ship'' of which it is a species, imports relation to a remedial object standing outside of it and to which it is incidental. It is impossible, therefore, to speak of a general corporate receivership, except as an instrument arising out of and in the course of a final equitable or statutory remedy; it is also impossible to single out one specific kind of general corporate receivership such as the receivership for the liquidation of a corporation and designate it as *the* corporate receivership. This the petitioner has done when he argues at length that equity receivership must mean general receivership for liquidation of a corporation because it is *the* equity receivership, so far as corporations are concerned.

D. *There is no such legal concept as a receivership of the corporate person.*

Petitioner's theory of the unique character of the general receivership for corporate liquidation as well as of other general receiverships for all the corporate assets is based mainly on his assumption that such general receiverships attach to the person of the corporation, whereas, he claims, a foreclosure receivership is always in rem.

The theory of the petitioner's case that ''equity receivership'' must necessarily be confined to the general receivership for the corporate assets is that such a general receivership differs from all others in that it is a receivership *of the corporation itself*, a receivership for the corporate person, whereas other receiverships may involve corporate assets but do not attach to the jural person of the corporate entity. We have already commented upon this colloquialism and pointed out the fundamental importance that it assumes in the petitioner's case.

It is our contention that this colloquialism represents a fundamental misconception of the nature of a general cor-

porate receivership, and that strictly speaking it has no legal meaning whatsoever. These general receiverships, like any other, operate only in rem upon a fund or property. Their only difference from other receiverships is that they operate upon *all* the corporate property. A receivership for the liquidation of a corporation is not a receivership for its dissolution as a corporate entity or even for its custody as a corporate entity. Its sole function is to distribute the property, but it has no legal operation or effect whatsoever upon the corporate legal personality. There is no such legal arrangement as a receivership of the corporation itself.

Speaking of the general receivership for the corporation, Beach Receiverships, Second Edition p. 12, says:

> "They always affect and are directed against *property*, either personal or real, or both."

The Supreme Court of Illinois in *Owen M. Railway* v. *Russell*, 115 Ill. 52, said:

> "The appointment of a receiver for a corporation gives the receiver only temporary management of its affairs under the direction of the court, and the corporation still exists and may, nevertheless, exercise any of its franchise, so long as it does not interfere with the rightful management of its affairs by the receiver as his duties are defined by the court appointing him."

In *Chemical Bank* v. *Deposit Company*, 156 Ill. 522, 429, the court said in speaking of a general receivership for the purpose of liquidating a corporation:

> "The corporate existence of the association is not dissolved and the association as a legal entity continues to exist."

And Beach Receiverships, Second Edition, p. 467, says:

> "The mere appointment of a receiver does not dissolve the corporation, hence it may still sue and be

sued. The effect of the appointment is to sequestrate its property, but the corporation still retains its identity."

And again on page 473:

"Its stockholders continue their existence qua stockholders, and its contracts may be enforced against it. The existence of the corporation is not destroyed or suspended by the action of the court of equity in taking possession of its property and franchise, and it may be sued upon all causes of action upon which it may be or become liable *in personam*, no license from the court being a condition precedent to the bringing of such action."

It follows that in a general receivership for the purpose of liquidating a corporate business or for any other purpose the legal person of the corporation is not in the custody of the receiver or affected by the receivership. *The main ground, therefore, upon which the petitioner distinguishes such general corporate receiverships from all other equity receiverships, falls.* The sole differences between receiverships involving corporate property, whether general or limited, are differences in the remedies which they subserve and in the powers which the court delegates to them to effect their different purposes. One may be for the distribution of the corporate assets among its unsecured creditors; another may be in the course of an enforcement of a lien by secured creditors against pledged property. In none of these, however general its powers, is the corporation personally in custody of the receiver, and none of these therefore, is entitled to usurp the designation "equity receivership" to the exclusion of the others, because of a supposed unique relationship to the corporate person.

V.

PETITIONER'S CONTENTION THAT EQUITY RECEIVERSHIP MUST BE INTERPRETED AS BEING LIMITED TO GENERAL RECEIVERSHIPS FOR LIQUIDATION OF CORPORATE ASSETS, IF SUSTAINED, WOULD RENDER THE TERM "PRIOR EQUITY RECEIVERSHIP" ENTIRELY SUPERFLUOUS IN THE STATUTE.

The petitioner's chief contention on the authority of 2168 Broadway Corp. C. C. H. 3546, is briefly this: that Congress, in specifying a prior equity receivership as the occasion for the filing of a petition under 77B, must have had in mind a liquidating situation and that such a situation is the only sort which should be recognized as justifying proceedings for the relief of debtors. He points out that the term "prior equity receivership" is linked with "prior proceedings in bankruptcy" and is followed by a reference to "acts of bankruptcy," and argues that Congress, therefore, intended to refer in all of these terms to a situation where the assets of the corporate debtor were about to be liquidated and distributed among his creditors.

Section 77B (a) provides that the creditors' petition shall state that "such corporation is insolvent or unable to meet its debts as they mature and if a prior proceeding in bankruptcy or equity receivership is not pending that it has committed an act of bankruptcy within four months." This provision states three alternative requirements only one of which need be satisfied.

1. The existence of a prior equity receivership *plus insolvency or inability to pay debts as they mature.*

2. The existence of a prior proceeding in bankruptcy.

3. The commission of an act of bankruptcy within four months of the filing of the petition under 77B.

It is of crucial importance in the interpretation of these

provisions to observe that the pendency of a prior equity receivership is an alternative requirement to an act of bankruptcy. One of these acts of bankruptcy, Section 3A (5) is that "while insolvent a receiver or a trustee has been appointed or put in charge of his property." This act of bankruptcy has been construed to mean the appointment of a receiver for all the property of the bankrupt for the purposes of liquidation. The fact, therefore, that 77B (a) makes a prior equity receivership an *alternative* requirement" to an act of bankruptcy is a very strong argument that Congress intended to make this provision broader than the provision of the general bankruptcy act. Otherwise the statutory reference to "prior equity receivership" would be entirely superfluous. It is apparent, therefore that Congress did not, by its reference to a prior equity receivership, mean that specific kind of equity receivership which is equivalent to an act of bankruptcy. A petition under 77B (a) may be filed by creditors not only after there is an act of bankruptcy such as the appointment of a general receiver for the purposes of liquidation but also if there is any prior receivership in equity. On no other hypothesis can the phrase "prior equity receivership" be interpreted without redundancy. In conformity with the principle that a statute is to be interpreted so as to give effect, if possible, to every part thereof the term "prior equity receivership" must be given a broader meaning than equity receivership for the liquidation of a corporation which is an act of bankruptcy. This construction gives to each word a definite and reasonable meaning and each word is appropriately used. (*Chicago Home for Girls* v. *Carr*, 300 Ill. 485.)

The court, *In re Broadway Building Corporation*, C. C. H. 3546, failed to take these considerations into account. Instead, it was strongly impressed by the fact that to con-

stitute an act of bankruptcy a receivership must be a general receivership for liquidation or reorganization.

Not only is this parallelism between "equity receivership" and acts of bankruptcy indefensible on general principles of interpretation for reasons just indicated, not only does it, in effect, interpret out of existence the phrase "equity receivership," but it ignores the vital differences between acts of bankruptcy and proceedings to adjudicate in bankruptcy on the one hand, and proceedings under Section 77B on the other. Proceedings under 77B are proceedings before the bankruptcy court, but they are not proceedings for adjudication in bankruptcy. Adjudications in bankruptcy are proceedings looking to the liquidation of an insolvent estate and its distribution among creditors. Section 77B is not a statute of liquidation, but a statute of reorganization. It creates a new form of relief for debtors. For the new proceeding under Section 77B, Congress in Section 77A provided a new and additional jurisdiction, and in Section 77B (a) exhaustively specified the jurisdictional facts pertinent to such new proceeding. If Congress had meant the same jurisdictional requirements to apply to proceedings under Section 77B as to adjudications in bankruptcy, why did it include Sections 77A and 77B (a)? It would have said nothing about "equity receivership pending." It would not have set up exhaustively the jurisdictional requirements for petitions under Section 77B. If it did so it was because it did not wish proceedings thereunder to be bound by the limitations of conventional bankruptcy procedure, but wanted to set up a new form of jurisdiction and a new proceeding which broadens the possibilities of relief by amicable arrangement between harassed creditors and debtors. The fact, therefore, that Section 3(a) sub. 5 refers to a general liquidating receivership offers no parity of reasoning which compels an identical interpretation of Section 77B.

VI.

PETITIONER'S ARGUMENT FROM ANALOGIES DRAWN FROM OTHER PARTS OF THE STATUTE INVOLVES CIRCULAR REASONING IN THAT IT IMPROPERLY ASSUMES "EQUITY RECEIVERSHIP" TO BE IDENTICAL WITH ONE PARTICULAR SPECIES THEREOF, NAMELY GENERAL LIQUIDATING RECEIVERSHIPS.

Petitioner quotes other parts of the statute in which the term equity receivership is used or reference is made to the powers of an equity receiver. He has no difficulty in showing that this means receivers in general and not any particular limited species of receivership. Thus, sub. C2 states that the trustee under 77B shall have the "same powers as those exercised by a receiver in equity." Other sections of the statute deal with the exercise of powers by receivers in equity for the purpose of giving analogous powers to the officers of the bankruptcy courts in certain defined and specified situations. The intention of these provisions is to confer as broad powers as are exercised by *any* receiver in equity, that is to say, powers exercised in receiverships in general. Petitioner then simply assumes receiverships in general to mean a general receiver for liquidating the assets of a corporation, but such general liquidating receiverships as we have seen are only one particular species of the genus, receivers in general. Obviously there is in effect a play here by the petitioner upon the word "general" and an improper identification of "general corporate liquidating receivership" with the term "receivers in general". The consequence of this confusion would be to cut down the powers of such trustees under 77B, because it does not necessarily follow that the powers of general liquidating receivers are greater than the powers of all other kinds in *all* respects. Thus a receiver for mortgaged property in foreclosure proceed-

ings may have wider powers in dealing with the pledged property than a general receiver for liquidating the corporation, whose powers are generally confined to unpledged property and unsecured creditors. And certainly so far as the *jurisdiction* of the court to entertain petitions is concerned, such a confusion between general corporate receivers and receivers in general would result in disastrously restricting it.

After making this improper substitution of general corporate receiver for receivers in general the petitioner proceeds to accuse us of this very impropriety. He contends that we propose to substitute for the term "receivers in equity" the term "receivers in foreclosure proceedings." This is precisely what we have not done and do not do. It is precisely the sort of thing that we object to in his own treatment. It is we who have contended that "equity receivership" cannot be restricted to any particular sort of receivership in equity; that it is a generic and inclusive term comprising all particular kinds of receivers in foreclosure proceedings, general receivers to liquidate corporate assets, general receiverships to carry on corporate business temporarily, etc. These receivers have different duties and different powers. Thus a liquidating receiver may not have power to continue the business, but has the power to sell; the receiver to run the corporate business temporarily because of mismanagement of the officers has the power to conduct the business but not to liquidate it; the receiver in mortgage foreclosure proceedings may have the power to operate and deal with the pledged real estate, a power which the other receivers may not have. It is the petitioner who substitutes for the term equity receivership whenever it occurs in the statute, a particular kind of equity receivership, namely a general receivership for the purpose of liquidating the corporate business. It is not we, but the petitioner who reads arti-

ficial and restrictive limitations into powers of the court's officers when these are constituted by analogy in the statute to the powers of equity receivers in general and into the extent of the court's jurisdiction by identifying the general concept of equity receiverships with one of its particular kinds. His fundamental error in all of this is failure to perceive that a general receiver to liquidate a corporation or for any other corporate purpose, however great its powers, is only a particular kind of receivership in equity.

VII.

AN "EQUITY RECEIVERSHIP" FOR THE PURPOSES OF FILING A PETITION UNDER 77B IS DEFINED BY SUB. (i) THEREOF.

The only kind of a receivership which constituted an act of bankruptcy under the old act was a general receivership under Section 3-A for the purpose of liquidating the business of a corporation. Section 77B (a) by requiring *either* a prior equity receivership *or* an act of bankruptcy, in the alternative, as one of the necessary jurisdictional requirements, clearly intended to make broader and more inclusive the class of equity receiverships which may serve as the occasion for the filing of a petition under 77B. This intention to broaden the provisions of the old Bankruptcy Act is made conclusive by the explicit language of Section 77B in sub. (i) thereof, which provides:

> "If a Receiver or Trustee *of all or any part* of the property of the corporation has been appointed by a Federal, State or Territorial court, whether before or after this amendatory Act takes effect, a petition or answer may be filed under this Section at any time thereafter by the corporation, or its creditors, as provided in Sub. (a) of this Section."

Here we have conclusive corroboration in the terms of the statute itself of our general argument that "equity

receivership" includes all receivers in equity who have custody and administer all or part of the debtor's property. This provision is nothing less than a definition of "equity receivership" for the purpose of filing a petition under 77B.

Subdivision (i) explicitly states that a petition may be filed if *all or any part* of the property of the corporate debtor has been placed in receivership. In the case at bar, substantially all of the property of this corporate debtor is in the hands of a receiver. Although it is therefore in substance and in fact a receivership for the purpose of liquidating all of the property of the corporation, it is unnecessary to insist upon this point in view of the explicit provisions of subdivision (i). There can be no doubt, therefore, if language is to be given its plain meaning, that for the purposes of filing a petition under 77B, an equity receivership includes a receivership for the property involved in a mortgage foreclosure suit, since this is an equity proceeding in which *all or part* of the debtors' property is in the hands of a receiver.

The weakness of the reasoning in *Re 2168 Broadway Corp.*, C. C. H. 3456, becomes distressingly apparent in the Court's discussion of subdivision i. After first appearing to admit the force of the contention that words mean what they plainly say, the court in order to be consistent with the view earlier expressed by it, is forced to adopt a purely fanciful meaning that has utterly no warrant either in the words of subdivision i or in its purpose. That provision, says the court, "contemplates a situation where the corporation may have property outside the jurisdiction of the appointing court, in which case only part of its property could be in equity receivership without ancillary proceedings." There is nothing in subdivision i that even remotely bears on the question of ancillary proceedings or

on the situation where part of the debtor property is outside the equity court's jurisdiction. Clearly, the Court in *Re 2168 Broadway Corp.* is embarrassed by the express words of the statute and therefore resorts to the desperate expedient of making a pure "conjecture *aliunde.*"

A. *The proviso in Sub. (i) refers to the jurisdictional requirements of sub. (a) other than the existence of a prior equity receivership. On this construction sub. (i) and sub. (a) are completely harmonious.*

A question has been raised concerning the meaning of the proviso of sub. (i): " *as provided in Sub. (a) of this Section.*"

> "If a receiver or trustee of all or any part of the property of the corporation has been appointed by a Federal, State or Territorial court, whether before or after this amendatory Act takes effect, a petition or answer may be filed under this Section at any time thereafter by the corporation, or its creditors, *as provided in Sub. (a) of this Section.*"

Sub. (a) sets forth the jurisdictional requirements for the filing of petitions under 77B. These consist of the following, for petitions by creditors:

1. The corporation must be one of those corporations which could become a bankrupt under Section 4, that is, it must not come within any of the excepted five classes thereof.

2. The petition must be filed by three or more creditors, with provable claims of at least one thousand dollars.

3. The corporation must be insolvent or unable to pay its debts.

4. There must be in the alternative either
   (1) A prior and pending equity receivership;
   (2) A prior and pending bankruptcy proceeding;

or

(3) An act of bankruptcy within four months of the filing of the petition.

5. The petition must be brought in the judicial district where the debtor (1) had its principal place of business for the greater portion of the preceding six months, (2) had its principal assets for the greater portion of the preceding six months, or (3) in any judicial district of the state where it was incorporated.

The effect of the proviso "as amended in Sub. (a) of this Section" is that if there is a receivership, as defined by sub. (i), then a petition may be filed only if all the other jurisdictional requirements contained in sub. (a) are satisfied. By force of this proviso it is not enough that a receiver was appointed for all or part of the debtors' property, in order to qualify the petition. The petitioners must allege the insolvency or inability of the debtor to pay its debts, they must have the proper amount of provable claims against a corporation which does not come within the accepted classes of Section 4, and their petition must be filed in the proper judicial district. The meaning of the proviso under discussion lies in this reference back to the other jurisdictional requirements of sub. (a) which must be satisfied by a petition based on the existence of a prior equity receivership of all or any part of the debtors' property.

What Subdivision i means is that in determining the existence of the necessary jurisdictional facts for creditors petitions under Section 77B, the special or general character of the receivership, whether it be for all or for only part of the debtors' property, is entirely immaterial. Where for example there is a general receivership of the corporation because of mismanagement or fraud for the purpose of conserving the corporate assets pending the appointment of a new set of officers, *and where the finan-*

cial condition and solvency of the corporation is not in issue, a creditors' petition under Section 77B will not lie, despite the fact that there is a general receivership. Insolvency, which is a prime jurisdictional fact, cannot there be alleged. For the purpose of determining jurisdiction under Section 77B, there is no distinction between kinds of equity receivership in respect of their generality, *provided the other jurisdictional requirements set forth in 77B, sub. (a) are satisfied.* These, among others, include the necessity that the corporation shall be insolvent or unable to pay its debts. If this allegation cannot be made, then, whether the corporate receivership be general or special, whether it be for mismanagement or in the course of foreclosure of a mortgage, or for any other purpose, the relief of 77B is not available. But if, on the other hand, a corporation, all or part of whose property has been placed in equity receivership for any purpose, is insolvent or unable to pay its debts and can satisfy all the other jurisdictional requirements of sub. (a), then there is that sort of prior equity receivership which enables creditors to file their petition for relief under 77B.

At this point, it is appropriate also to consider the hypothetical case propounded by the petitioner (pp. 3-4, his brief), where a completely solvent debtor owns a dozen hotels, of which only one is in foreclosure, and in the hands of a receiver. A petition under 77B would lie only if it could be alleged among the other necessary jurisdictional allegations that the corporation was insolvent, or unable to pay its debts. If this be true, there is no difficulty whatever in holding that the corporation is within the purview of sub. (i) and has satisfied the requirements of the proviso "as provided in Sub. (a) of this Section." There is nothing whatever startling or absurd in this consequence, provided it be kept in mind that the corporation must be

insolvent or unable to pay its debts. In the supposed case, a petition under Sec. 77B could not lie even though there is a prior equity receivership, because there is no insolvency.

B. *The rationale of sub-div. (i) is to extend authority of bankruptcy courts under 77B to cases where the equity receivership does not constitute an act of bankruptcy, but where the corporation is insolvent and part or all of its property is in custodia legis.*

The purpose of sub. (i) is this: Whenever *all or part* of the debtor's property is in the custody of a court of equity through its receivers, then, provided the other jurisdictional facts of sub. (a) are satisfied, including insolvency or inability to pay its debts, the bankruptcy court may take jurisdiction over a petition by its creditors under 77B. There is a sound reason for this. Because if all all or part of the debtor's property has come into the custody of a court, it does so because the debtor is involved in conflicting claims and equities. It is in trouble. Its affairs are in an abnormal condition. Its creditors are barred from pursuing their ordinary remedies. The ordinary course of creditor-debtor relationship has been interrupted, and the business and assets of the debtor, wholly or partially, have been taken over for supervision and management by a court of equity. If, under these conditions, the debtor is insolvent or unable to pay its debts, then there is a situation which is properly cognizable in a bankruptcy court in a proceeding for the relief of the debtor under 77B.

The jurisdiction of the bankruptcy court under 77B rests, not on the specific purpose of the receivers custody. The purposes for which property can come into *custodia legis* are indefinitely large in number. They defy enumeration

within the limits of a statutory enactment of this character. They can be characterized and described, as we have seen, only in terms of the primary rights and primary remedies, which are the subject matter of equity jurisdiction and with respect to which a receivership is merely an auxiliary device. Section 77B was not limited in its operation to any one kind or to any specific or enumerated kinds of equity receivership. The fact itself that the device of receivership in equity is being used to place all or part of the debtor's property in the custody of a court of equity establishes the fact that an abnormal condition exists and confers jurisdiction upon the creditors' petition under 77B, provided the other jurisdictional facts of sub. (a) are satisfied, including the insolvency or inability of the debtor to pay its debts.

VIII.

THE EXCLUSION OF MORTGAGE FORECLOSURE RECEIVERSHIPS FROM THE TERM "EQUITY RECEIVERSHIP" WOULD WORK IRREMEDIABLE HARM TO ONE OF THE LARGEST CLASSES OF INVESTORS AND WOULD SHUT OFF ALL POSSIBILITY OF THEIR RELIEF UNDER SECTION 77B UPON THEIR OWN PETITION.

Real estate bondholders are one of the most important classes of creditors in this country, and one of those classes most in need of relief.

In practically all cases where a default has occurred in the mortgage securing their bonds, a foreclosure proceeding in equity has ensued with the appointment of a receiver as the unusual concomitant. No general receivership for the liquidation of the corporation assets has been regarded as necessary or desirable because such general receiverships were intended primarily for the liquidation of unsecured assets among the unsecured creditors and because in practically all cases involving real estate bond issues by

building corporations, the pledged property comprised substantially all of the assets of the debtor. In many cases after foreclosure proceedings were instituted, the corporate existence has been terminated by forfeiture of the charter. A petition for ordinary adjudication in bankruptcy is not available in the ordinary foreclosure of a bond issue against a real estate corporation on the ground of an act of bankruptcy because such acts have occurred long ago, much more than four months before the filing of a petition under 77B. It was to make relief under 77B available to creditors in such situations that Congress made the existence of *any prior equity receivership* a sufficient ground for the assumption of jurisdiction, provided the other jurisdictional requirements were satisfied; and then added sub. (i) expressly granting jurisdiction in cases where *all or part* of the property of the debtor was in the hands of an equity receiver.

A. *It was the intention of Congress in Section 77B to encourage the transfer of proceedings, involving the insolvency of corporate debtors, from the state to the federal courts.*

The new form of relief for corporate debtors, provided in Section 77B, was created because the procedure for corporate reorganizations in ordinary receiverships and foreclosures had broken down. Such proceedings were attended by very long delays, were expensive, cumbersome, and made it possible for designing minorities to prevent reorganizations by insisting on special privileges. Section 77B was passed by Congress to provide a more expeditious procedure and to encourage the transfer of reorganizations from the state to the federal courts. This purpose has been stated by Judge Evans, of the Seventh Circuit Court of Appeals, in *In the Matter of Mabel Messenger Sterba,*

Debtor, October term, 1934, No. 5193, decided January 5, 1935, wherein he said:

> "This section was enacted because of the failure of receiverships to effectuate, and in many instances to attempt, reorganizations. In equity receiverships, on occasions, the jurisdiction of a court was invoked and a receiver appointed where the mortgage vastly exceeded the value of the property and there was no equity of redemption, and yet the receivership was continued for three, four and even five years, with the expenses of the receivership consuming the entire revenue and leaving the bondholders in a worse position each year. The amendments to the Bankruptcy Act, above mentioned, were enacted to remedy the intolerable and seemingly hopeless condition that existed, due to the inadequacy and abuse of the remedy which receivership proceedings afforded, as well as to a desire to help debtors who could not meet their obligations but who entertained a well-founded belief that they would ultimately pay their creditors in full from their properties, the values of which were so drastically reduced."

And again by Judge Lindley, sitting in the District Court for the Eastern District of Illinois, in *In the Matter of Surf Building Corporation, a corporation, Debtor,* No. 252-D, wherein he stated:

> "* * * when one observed the obvious benefits possible in reorganization of corporations by proceedings under 77B, as compared with effectuation of the same result by a court of chancery, whether it be in the State Court or the Federal Court, it necessarily follows that one cannot be charged with bad faith because he approves that method which works with simpler machinery, less expense, great saving of time and greater efficiency of result."

And again in the decision rendered February 26, 1935, by Judge Lindley, in this cause wherein he stated:

> "As the Court has previously pointed out, the intent of Congress apparently was *to give the holders of bonds in default an opportunity to have property securing*

their bonds reorganized in the Federal Court in lieu of liquidation under foreclosure in either the State or Federal Court. Acting in pursuance of that right, the creditors, after patience with long extended foreclosure proceedings, not yet blossoming into decree, have filed their petition in proper form and submitted their evidence. The Court finds that the petition was filed in good faith and should be approved."

Reorganization of real estate corporations under Sec. 77B rather than in foreclosure proceedings in the state courts offers great advantages to all parties concerned. It avoids the entire expense, and in Illinois the intolerable delay of foreclosure, with its accompanying redemption periods. Many a real estate reorganization would have been effected satisfactorily within the last few years if nondepositors could, as they can under 77B, have been compelled to accept securities along with the assenting creditors of the same class, instead of being able to demand cash, the difficulty of securing which made the reorganizations impossible of accomplishment. Another advantage of great importance under 77B is that reorganization thereunder eliminates the necessity of filing registration statements under the Federal Securities Act. All of those who have had experience with such registrations, especially in real estate reorganizations, will realize the tremendous saving in time and expense thus accomplished. The same reason which exempts registration at Washington, namely, that the plan is passed upon, approved and administered under the jurisdiction of the court and found to be fair and equitable in all respects and toward all parties whomsoever, is a reason which will commend itself to bondholders everywhere. It will help to create a feeling of confidence among the holders of securities, and will go a long way toward assisting in the rehabilitation of real estate, which is of fundamental importance to the rehabilitation of business in general.

B. *Section 77B is highly remedial and should be liberally construed to effect the purposes of the legislation.*

In *Campbell* v. *Allegheny Corporation*, C. C. A. 4th C. Md. March 2, 1935, Judge Parker said:

> "*The statute is of a remedial character* designed to facilitate the reorganization of corporate business made necessary by the economic depression through which the country has been passing. *Its purpose should be forwarded by a fair and liberal construction of its provisions, not thwarted by any narrow or technical interpretation.*"

So inclusive is the purpose of Congress to grant relief to embarrassed business enterprises that petitions under 77B have been approved even where the debtor has ceased to exist as a corporate entity by giving up or losing its corporate charter prior to the petition. *In re* 211 *E. Delaware Place Building Corporation,* which has since been affirmed by the Circuit Court of Appeal, 7th Circuit; *in re Surf Building Corporation,* U. S. District Court, E. D. Ill., October 17, 1934. The ground for these holdings was that Congress under 77B intended to grant relief to the creditors of any corporate debtor. To effect this purpose courts will look beyond the form to the substance. It has been held *in re* 211 *E. Delaware, supra,* that in a real estate bond issue of a building corporation, the real object of the proceedings under 77B is to reorganize and readjust the claims against the property itself and that the proceedings is only incidentally a reorganization of the debtor corporation. The necessary implication seems to be that the reorganization of a real estate corporation is essentially a proceeding *in rem.* As the court said *in re* 211 *E. Delaware, supra*:

> "Nothwithstanding the forfeiture of the corporate charter the property of the debtor must still be distributed. Congress by reason of legislation has ex-

tended the jurisdiction of the District Court to the reorganization of the *res.*"

To refuse relief upon a purely technical ground, even when that ground is the disappearance of the corporate debtor itself, would be to deny large classes of creditors the remedy which Congress intended to put at their disposal. Sections 77A and B were enacted by Congress in the face of a great national emergency which still exists. It is a remedial statute of the highest sort and in accordance with well known principles of statutory construction must be liberally construed.

In the matter of *Harrison Parker, et al.*, 48 A. B. R., 698, Judge Evans, sitting as an acting District Judge, said:

> "(a) The Bankruptcy Act (Comp. St. 9585-9656) *was a general enactment of a remedial character, and shall be liberally construed to effect the purposes of the enactment.* * * * Uncertainty may well arise over the term 'unincorporated company.' Respondents ask the court to give this term of restricted meaning. But should the court do so, if the result of such a construction is to defeat in part, at least, the manifest purpose of the entire enactment?"

Conclusion.

Section 77B nowhere speaks of "general corporate receivership" or of receivership of the corporation itself, but only of "equity receivership," which is the broader, the more inclusive, the generic designation. Even assuming that definite and precise language may be ignored, if the plain meaning of this provision is to be rejected in favor of a highly restricted, special and colloquial meaning, there must be compelling reasons which require the court to do so. All the reasons which petitioner, relying upon *In re 2168 Broadway Corp.*, C. C. H. p. 3546, has produced for disastrously limiting the court's jurisdiction involve mis-

conceptions of the general legal principles and are unsupported by any internal evidence in the statute itself. On the contrary, his construction would interpret "prior equity receivership" as equivalent to an act of bankruptcy. This would render the whole provision redundant, would require creditors to prove the same jurisdictional facts for relief under Sec. 77B as they would have to prove in order to obtain an adjudication in bankruptcy, and would ignore the intention of Congress to create a new and supplementary form of relief.

The statute itself, moreover, explicitly defines the term "receivership" in sub. (i) as receivership *of all or part of* the corporate property. This definitely disposes of petitioner's argument and renders conclusive the results of our discussion on general principles, viz.: that there is no valid argument for restricting the term "equity receivership" to the general corporate receivership in any of its forms, so as to exclude a receivership of *all or part* of the debtor's property, arising out of foreclosure proceedings in equity. On the contrary, every reason of expediency and policy requires the term "equity receivership" to be read in its plain meaning as referring to any receivership in equity, including mortgage foreclosure receiverships. Otherwise the remedial purpose of Section 77B will be completely frustrated with respect to one of the most important classes of creditors.

It is respectfully submitted therefore that the decision of the Circuit Court of Appeals in this cause is in accordance with the law and that the petition for certiorari should be denied.

Respectfully submitted,

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